

JUNE 1997

U.S. Department of Transportation Releases Proposed Changes to Disadvantaged Business Enterprise (DBE) Program

On May 30, 1997, the Department of Transportation published its proposed changes to the Department's Disadvantaged Business Enterprise (DBE) program as a Supplemental Notice of Proposed Rule Making (SNPRM) in the Federal Register. The Department is seeking comments on the SNPRM for a period of 60 days.

The SNPRM will do two things: modify the program to ensure it meets the "narrow tailoring" of the Supreme

Court's decision in *Adarand v. Peña* and reinvent its administration to increase effectiveness and reduce burdens.

NARROW TAILORING PROPOSALS

- Ensure that the overall goal provisions of the program meet nondiscrimination objectives by determining how much DBE participation there would be if there were truly a level playing field for DBEs. The SNPRM seeks comment on three mechanisms to achieve this result.
- Give priority to race-neutral measures,

such as outreach and technical assistance, in meeting overall goals. Recipients would look to these approaches before using race-conscious measures, such as contract goals.

- Emphasize the need for recipients to take good faith efforts seriously. Recipients must award a contract to a bidder who documents adequate good faith efforts, even if the bidder doesn't fully meet a contract goal.

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Department of Justice Responds to Comments to Proposed Reforms to Affirmative Action in Federal Procurement

On May 23, 1996, the Department of Justice published its Proposed Reforms to Affirmative Action in Federal Procurement. The Department reviewed over 1,000 comments. The report discussed the observations and concerns most frequently expressed, and described the changes to the proposal that were made in response to those comments. In addition, the Federal Acquisition Regulatory Council published for comment proposed amendments to the Federal Acquisition Regulation that will implement the contracting mechanisms described in the Justice Department proposal.

Among the issue covered in the response were the following:

Concern: Determination of Social and Economic Disadvantage

Many of the comments expressed

concern that the proposal permit each federal agency to determine whether firms are owned and operated by individuals who are socially and economically disadvantaged. The primary concern was inconsistent decisions by different agencies, leading to forum shopping, where firms would search to find the agency with the most lenient standards. While that possibility is less of a concern for persons who belong to minority groups statutorily presumed to be socially and economically disadvantaged, the concern expressed in quite a few comments was that individual agency determinations could lead to inconsistent results when persons who are not members of "presumed groups" seek to be determined to be socially and economically disadvantaged. The comments almost universally suggested that determination of social and economic disad-

vantage be made exclusively by the Small Business Administration (SBA), which already makes similar determinations under the 8(a) program.

Response: The proposal stated that while agencies could perform this function themselves, it also stated that an agency might wish to assign this responsibility to SBA. Consistency is a critical feature, and the SBA is in the best position to ensure consistent application of standards on social and economic disadvantage. As a result, the SBA has been assigned responsibility for developing procedures and standards that will govern federal determinations of social and economic disadvantage, and will be assigned to do determinations of social and economic disadvantage. A system will be developed that will ensure that SBA

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has resources to support this effort.

Concern: Certification of Ownership and Control

A number of comments also questioned the proposal's decision to rely on private, state and local organizations to make certifications that a firm is owned and controlled by socially and economically disadvantaged individuals. Those comments urged the government to permit SBA to make that certification, noting that this approach would be more efficient for Small and Disadvantaged Businesses (SDBs).

Response: As stated in the original proposal, there already is an exhaustive system of private, state and local certifiers of ownership and control in place, and creation of a federal structure to perform this process seems unnecessary and wasteful.

Concern: Re-certifications

A number of comments stated that it was unnecessarily expensive to require SDBs to provide updated certifications of ownership and control every three years. The comments urged the government to permit SDBs simply to update their certifications and to keep the certification for a longer period, perhaps five years.

Response: The interval between certifications will remain at three years. The effort to meet strict scrutiny requires that the benefits of affirmative action go only to those individuals and firms that truly qualify for competitive advantages. One way is to ensure that firms that are determined to be SDBs continue to be eligible for that status. While annual updates will help that process, many firms undergo significant changes within three years of operation...

Concern: Counting 8(a) Contracts Toward the Benchmark Limits

A number of comments asserted that the government should not include con-

tracts awarded pursuant to the SBA's 8(a) program when determining the amount of money that has been awarded to minority-owned firms in each SIC code. The reason, many asserted, was that the 8(a) program is not based on racial considerations, but rather is a race-neutral business development program. Therefore, the comments stated, race should not be considered to have been a factor in the award of those contracts. The comments also stated that, if achievement of a benchmark is an indication that there is less of a need for affirmative action programs, we should not count 8(a) contracts because those developing firms are not fully competitive, and the award of an 8(a) contract is not an indication that the minority-owned firm would fare as well in open competition.

Response: First, while the 8(a) program is a business development program, the race of the owner of a firm is a factor in the manner in which a firm may become certified as eligible for an 8(a) contract. Therefore, 8(a) is not an entirely "race-neutral" program.

Second, and more importantly, these comments may reflect a misunderstanding of the assessment that will be made at the end of each fiscal year. As explained in the proposal, the benchmark figure will represent the extent to which the government would expect contract dollars in particular industrial activities to be awarded to minority-owned firms in the absence of discrimination or its effects. The reason to measure the extent to which minority-owned firms have received federal contracts is to determine whether race-conscious programs, like price or evaluation credits, continue to be needed to ensure that firms owned by minorities have a fair opportunity to compete for and win federal contracts.

This assessment must count all contracts awarded to minority-owned firms, whether through race-conscious pro-

grams or through free and open competition. Only by determining the extent of minority participation in contracting, and then by determining whether that participation has been achieved through full and open competition, race-conscious action programs, or by a combination of the two, can we determine whether race-conscious programs continue to be needed in that SIC code.

Therefore, when a contract is awarded to a minority-owned firm through the 8(a) program, it must be counted towards the benchmark. It must be counted simply because the firm that was awarded the contract is owned and operated by a minority individual or individuals.

Concern: When Achievement of the Benchmark in a SIC Code Will Result in Curtailment or Elimination of Race-Conscious Action in that SIC Code

A number of comments requested clarification of precisely when achievement of a benchmark would result in curtailment or elimination of affirmative action measures.

Response: Some of these comments suggested a misunderstanding of the proposal. Achievement of a benchmark in a particular SIC code does not automatically mean that race-conscious programs, or the use of 8(a) contracts, will be eliminated in that SIC code. The purpose of comparing utilization of minority-owned firms to the benchmark is to ascertain when the effects of discrimination have been overcome and minority-owned firms can compete equally without the use of race-conscious programs. Full utilization of minority-owned firms in a SIC code may well depend on continued use of race-conscious programs like price or evaluation credits. Where utilization exceeds the benchmark, the Office of Federal Procurement Policy (OFPP) may authorize the reduction or elimination of the level of price or evaluation credits, but only after analysis has projected the effect of such action.



Follow the Money

DOT Awards \$14.9 Million in Grants for Improvements at Four Texas Airports

U. S. Secretary of Transportation Rodney E. Slater announced May 8 the award of \$14.9 million in grants for improvements at four Texas airports.

The airports include Houston Intercontinental Airport and Ellington Field in Houston; Sheppard Air Force Base/Wichita Falls Municipal Airport in Wichita Falls and Mathis Field in San Angelo.

FRA Awards \$10 Million to Alaska Railroad to Improve Railroad Operations

The Federal Railroad Administration (FRA) announced on May 1 a grant of \$10 million to the Alaska Railroad Corporation for capital rehabilitation and safety improvements to passenger railroad operations throughout the state of Alaska.

The FRA financial assistance will enable the railroad to continue restoration of mainline track and improve the communications system to permit faster, more reliable and safer passenger train operation. The state of Alaska, acting through the Alaska Railroad corporation, is the only state that directly provides intercity rail passenger service. In any rural areas, the Alaska Railroad represents the only reliable surface trans-

portation during the winter.

DOT Awards \$6.87 Million in Grants for Airport Improvements in South Dakota

U.S. Secretary of Transportation Rodney E. Slater announced on May 8 the



Alaskan Passenger Train

award of \$6.87 million in grants for improvements at South Dakota airports.

Other airports and funding for projects, which may include signs, runway or safety area improvements, or funds for designs, include:

Aberdeen Regional Airport	\$500,000
(Includes snow removal equipment)Huron Regional Airport	800,000
Pierre Regional Airport	987,000
Platte Municipal Airport	405,000
Mitchell Municipal Airport	100,000
Rapid City Regional Airport	860,000
Redfield Municipal Airport	405,000
Watertown Municipal Airport	558,000

DBE Proposed Regulations from p.1

- Limit potential adverse effects of the program on other parties (e.g. by addressing any over-concentration of DBEs in certain types of work).
- Provide for program waivers that will afford recipients increased flexibility in implementing the program.

REINVENTION PROPOSALS

- Reduce burdens on small business by adopting a "one-stop shopping" mechanism in each state for DBE certification.
- Clarify and make more explicit cer-

tification standards and procedures to bring certainty and predictability into a currently confusing system. This addresses one of the most common complaints of participants in the DBE program.

•Propose methods to solve problems faced by small businesses working in the program, like late payments from prime contractors.

•Authorize measures that recipients can take to assist DBEs, such as business development and mentor-protégé programs.



*Luz Araoz Hopewell,
Director of the Office of
Small and Disadvantaged
Business Utilization*

This issue contains two important articles directly related to contracting opportunities for small and disadvantaged businesses. Our lead article highlights the regulatory changes proposed by the Department to its Disadvantaged Business Enterprise (DBE) program. The proposed changes are consistent with the Administration's approach to affirmative action of "Mend it, don't end it." The Department of Transportation's DBE program applies to highway, transit, air and rail contracting opportunities from DOT-assisted State and local transportation agencies. The Department is "mending" the operation of the program through proposed changes in the rules that govern it. To do this the Department has issued a Supplemental Notice of Proposed Rule Making and I encourage our readers to review the proposed changes and provide your written comments by July 29, 1997. Written comments should be sent to Docket Clerk, docket no. OST-97-2550, Department of Transportation, 400 7th Street, SW, Washington, DC, 20590. The Department also plans to highlight/explain major provisions of the SNPRM

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Reactions and views on the proposed rule making must be submitted in writing by July 29, 1997.. Interested parties should submit written comments to Docket Clerk, docket no. OST-97-2550, Department of Transportation, 400 7th Street, SW, Washington, DC, 20590.. The Department will then review comments and issue a final rule.

The SNPRM can be found in the Federal Register of May 30, 1997. A full version of the SNPRM is also available on OSDDBU's web site by visiting the "What's New" section or "Legislative Issues."

Desk of the Director^{from p.3}

through a series of outreach efforts and by participating in major conferences.

Readers should refer to "The Calendar of Events" of this newsletter for outreach events where the SNPRM will be discussed. Also if your organization is planning a major outreach/conference event during the 60 day comment period and would like to sponsor a session on the SNPRM, please submit your request for consideration in writing or by fax (202) 366-7228 to our Office.

The second article provides a summary of the Department of Justice (DOJ) May 9 response to comments on the proposed changes to affirmative action in Federal Procurements originally issued on May 23, 1996. Readers should note that concurrent with the DOJ issuance, the Federal Acquisition Council published proposed changes to the Federal Acquisition Regulations (FAR) which will implement the contracting mechanisms described by the DOJ proposal. Comments are due to the FAR Secretariat on or before July 8, 1997. Both the DOJ release and the proposed FAR changes were published in the Federal Register of May 9, 1997. Copies of both issuances can be obtained on our web-site.

CALENDAR OF EVENTS OF INTEREST TO M/WBES JUNE/JULY/AUGUST 1997

Date	Event	Location	Contact
*June 14	American Public Transit Association Conference	San Antonio, TX	Candice A. Gonzalez (415) 921-5858
*June 25	USDOT/OSDBU Procurement Marketplace	Detroit, MI	Nelson Quinones (800) 522-6623
*June 25-29	National Association of Minority Contractors Annual Conference	Miami, FL	(202) 347-8259
*July 8 - 10	1997 Regional DBE Symposium	Atlanta, GA	Enrique Carrillo (800) 448-2585
July 8-10	Training and Development of Disadvantaged Small Business in Advanced Technologies (TADSBAT) Program Sponsored by NASA, OSDBU	Seattle, WA	(800) 933-8483 or (205) 922-1110 e-mail mta@iquest.com
*July 16	Regional Certification and Reciprocity Council, Orange County Transit Agency	Orange, CA	Amanda Vallejo (714) 560-5620
*July 17	Regional Transit Coordinating Council of the Bay Area, Alameda-Contra Costa Transit District Board	Oakland, CA	Sandra Privett (510) 577-8812
*July 27-30	16th Annual National MBE/WBE/EEO Contract Compliance National Conference for MBE/WBE compliance officers City of Boston, Harvard U. among others	Boston, MA	Joseph Delgado (617) 330-9400
August 5	Minority and Women Owned Business Marketplace Sponsored by McDonnell Douglas-Military Transport Aircraft, Hughes Electronics, Northrop Grumman, TRW Space & Defense, Lockheed Martin and Boeing	Carson, CA	fax address and phone number to: Carson Marketplace c/o Jan Korn, TRW (310) 813-5599
August 5-6	1997 Business Exchange Sponsored by the Cincinnati Minority Supplier Development Council	Cincinnati, OH	(513) 579-3137

**Event will include a session on the U.S. Department of Transportation DBE Program Supplemental Notice of Proposed Rule Making*

want more information?

Jump into the net.

<http://osdbuweb.dot.gov>

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